> procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.

RELEVANT STATUTES

N.J.S.A. 2A:53A-27 (West 2005), the New Jersey Affidavit of Merit Act, enacted in 1995 as part of the state's tort reform measures, provides:

> In any action for damages for personal injuries, wrongful death or property damage resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, the plaintiff shall, within 60 days following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices. The court may grant no more than one additional period, not to exceed 60 days, to file the affidavit pursuant to this section, upon a finding of good cause.

N.J.S.A. 39:6A-8(a) (West 2005), the New Jersey Automobile Insurance Cost Reduction Act (AICRA), enacted in 1998, in relevant part, provides:

> In order to satisfy the tort option provisions of this subsection, the plaintiff shall, within 60 days following the date of the answer to the complaint by the defendant, provide the defendant with a certification from the licensed treating physician or a board-certified licensed physician to whom the plaintiff was referred by the treating physician. The certification shall state, under penalty of perjury, that the plaintiff has sustained an injury described above. The certification shall be based on and refer to objective clinical evidence, which may include medical testing, except that any such testing shall be performed in accordance with medical protocols pursuant to subsection a. of section 4 of P.L. 1972, c. 70 (C. 39:6A-4) and the use of valid diagnostic tests administered in accordance with section 12 of P.L. 1998, c. 21 (C. 39:6A-4.7). Such testing may not be experimental in nature or dependent entirely upon subjective patient response. The court may grant no more than one additional period not to exceed 60 days to file the certification pursuant to this subsection upon a finding of good cause.

STATEMENT OF THE CASE

Petitioners' affidavit of merit against defendant Lee, due July 19, 2003, was submitted on August 1, 2003, approximately 12 days late. The delay was caused by Petitioners' mistaken reliance upon the erroneous advice of a fellow church member-lawyer that their claim was time-barred by the statute of

limitations. Due to the erroneous advice, due to their multiple relocations, and due to other problems, Petitioners did not retain their counsel (current counsel) until several days after their default in submitting the affidavit of merit.

Within two weeks of their submission of the affidavit of merit, Petitioners had fully discharged not only their "affidavit of merit" obligation but also their general discovery obligations, including full and complete responses to Form A and Form A1 interrogatories, the hospital records and other discovery materials, and identified their putative medical and economic experts, with disclosures of their c.v.'s.

On the basis of Petitioners' technical delay in submitting the affidavit of merit, defendant Lee moved to dismiss. In its decision dated September 12, 2003, the trial court held that the affidavit of merit was due by July 19, 2003, and because it was delayed by all of 12 days, he believed that his judicial "hands" were retroactively "tied" by the legislative branch. *See* T2:3.

> One of the things that always bothers me about statutes like the Affidavit of Merit Statute, is they do deprive people of an opportunity to litigate their case on the merits. . . .

Id. Because the real statute of limitations had passed by then, the dismissal became "with prejudice."

Because the Affidavit of Merit Act sets forth an arbitrary and meaningless method of "extinguishing" a legal claim which has already complied with the general tort statute of limitations, and applies arbitrarily only to one species of "tort" cases, namely

professional liability torts, and results in a dismissal without prior notice, a declaration of its unconstitutionality is necessary and proper.

REASONS FOR GRANTING A WRIT

I

THE AFFIDAVIT OF MERIT VIOLATES PETITIONERS' RIGHTS TO CONSTITUTIONAL DUE PROCESS, EQUAL PROTECTION AND SEPARATION OF POWERS

A. The Affidavit of Merit Act Violates Due Process

The Affidavit of Merit Act denies due process. Under New Jersey's law of evidence, in order to be admissible at trial, an expert's opinion must contain the factual basis for opinion that a defendant was somehow negligent. In contrast, a "net opinion," merely stating a conclusion that a defendant was negligent (as the Affidavit of Merit Act appears to require), is not admissible. The distinction is discussed in *Froom v. Perel*, 377 N.J. Super. 298, 317 (App. Div. 2005) thus:

> However, Milonas' testimony was patently insufficient to establish the requisite causal connection between the alleged legal malpractice by the Wilentz defendants and the damages allegedly sustained by FDC. Milonas' conclusions on the issue were clearly "net opinions." An expert's opinion must be based on facts, data, or

> another expert's opinion, either perceived by or made known to the expert, at or before trial. *N.J.R.E.* 703. The "net opinion" rule renders inadmissible any opinion consisting of bare conclusions that are unsupported by factual evidence. *Buckelew v. Grossbard*, 87 N.J. 512, 524, 435 *A.*2d 1150 (1981). An expert must "give the why and wherefore" of his or her opinion, rather than a mere conclusion. *Jimenez v. GNOC Corp.*, 286 N.J.Super. 533, 540, 670 *A.*2d 24 (App.Div.), *certif. denied*, 145 N.J. 374, 678 *A.*2d 714 (1996).
>
> Here, Milonas' opinions on proximate cause were no more than bare conclusions that were unsupported by any factual evidence. Milonas simply assumed that FDC was damaged because, in his view, the Wilentz defendants committed professional negligence. There was no evidence that, even had the Wilentz defendants not committed professional malpractice, as alleged by FDC, the transaction would have gone forward with the other parties agreeing to allow FDC to retain a 50% interest in the project. Milonas' testimony was a conclusion without any factual basis whatsoever.

The Affidavit of Merit Act does not appear reasonably related to the identification of meritorious and unmeritorious malpractice cases as it does not require an expert report in a form that would ultimately be admissible at trial. The Act merely requires a plaintiff to file, "an affidavit of an appropriate licensed person that there exists a reasonable probability that the

care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices." That statutory language may be tracked in an "affidavit of merit" that contains bare conclusions.

Because the Affidavit of Merit Act merely requires a conclusory affidavit from an "expert" in the field of practice of a malpractice-defendant, the question whether a malpractice complaint is meritorious, or not — the legislative purpose behind the Act, *see infra* — must, in reality, await a formal expert's opinion that discusses the "whys and wherefores" and that rises above the "net opinion" rule.

Yet, without an affidavit of merit submitted within the time allowed by the Act, all of "120 days" total, a lawsuit can be automatically extinguished. A dismissal for failure to comply the statute is to be "with prejudice unless there are `extraordinary circumstances.'" *Alan J. Cornblatt, P.A. v. Barow*, 153 N.J. 218, 246 (1998). The legislative rationale has been extensively discussed in various cases, including, more recently, in *Ferreira v. Rancocas Orthopedic Associates*, 178 N.J. 144, 149-50 (2003):

> The statute was one of five bills passed as part of a 1995 tort reform package designed to "'strike? a fair balance between preserving a person's right to sue and controlling nuisance suits.'" *Palanque v. Lambert-Woolley*, 168 N.J. 398, 404 (2001) (quoting Office of the Governor, *News Release* 1 (June 29, 1995)); *Cornblatt, supra*, 153 N.J. at 228.[fn1] . . .

Although the legislative goal is laudatory, "[t]his seemingly simple scheme has generated a tide of litigation" dealing with the failure to file an affidavit of merit within the statutory time period. *Ferreira*, at 146-47, *citing Cornblatt*, at 242. The New Jersey appellate courts responded by carving out "equitable remedies" which were clearly not stated in the face of the Act. *See id.*

Despite petitioners' reliance on *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1981), invalidating a two-tiered claim-preclusion regime similar to the Affidavit of Merit Act, the Appellate Division affirmed the trial court's dismissal on the basis *dictum* in *Cornblatt*. The New Jersey courts disregarded *Logan v. Zimmerman Brush* despite petitioners' repeated invocation.

In *Cornblatt*, the seminal case, the Supreme Court declined a constitutional challenge for failure to raise the issues below, but commented "in passing" that the Act was probably constitutional. *See Cornblatt* at 248. Most recently, in *Ferreira*, 178 N.J. at 155 n.1, the New Jersey Supreme Court again held that the constitutionality of the Affidavit of Merit Act would not be considered because the parties had not properly raised the issue. *See Balthazar v. Atlantic City Med. Ctr.*, 358 N.J. Super. 13, 20 (App. Div. 2003). Despite the fact that petitioners' constitutional challenge was properly preserved and raised at all stages, both the intermediary court and the state's highest court have ignored petitioners' constitutional attacks, *sub silentio*.

While courts are reluctant to invalidate a statute as "there is a strong presumption that a statute is constitutional," *see, e.g. WHYY, Inc. v. Glassboro*, 50 N.J. 6, 13 (1967), this New Jersey

Supreme Court's divided opinion in *Ferreira* shows the need for a constitutional review. Justice Albin's majority opinion underscored the unacceptable state of the Affidavit of Merit Act, left alone. Justice Long urges that *Cornblatt* be modified so that "excessively fine distinctions" are avoided in favor of a practical approach to precluding unmeritorious malpractice cases through *active judicial supervision*. *See Ferreira*, at 156-58:

> In each case, the trial judge should assess the facts, including the willfulness of the violation, the proximity of trial and any prejudice that would accrue to the party aggrieved by the filing deviation, and apply the appropriate remedy. The availability of sanctions short of dismissal with prejudice would align the Affidavit of Merit procedure with R. 4:37-2(a) for the first time since the statute was enacted. Moreover, it would provide judges with a response that is proportionate to most procedural violations and also would serve to save for trial the meritorious cases of injured victims of malpractice. Nothing in the statute itself precludes such an approach. It is only *Cornblatt* that stands in the way.

Id. at 157-58.

No less is required under *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988), and *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), which all stand for the proposition that a dismissal of a lawsuit should be done with judicial supervision, upon adequate notice reasonably calculated to apprize the

affected party, and an opportunity to be heard, irrespective of the legislature's laudatory goals of "screening" non-meritorious cases.

Justice Long's concurring opinion effectively supports Petitioners argument on equitable grounds, and Justice Zazzali's concurring opinion *directly* supports petitioners' constitutional attack, under the rubric of a "separation of powers" analysis. *See Ferreira,* at 161-69. Justice Zazzali maintains that Article VI, section 2, of the New Jersey Constitution, coupled with *Winberry v. Salisbury,* 5 N.J. 240, 247, 255, *cert. denied,* 340 U.S. 877 (1950), renders the Affidavit of Merit Act invalid under the separation of powers doctrine:

> [The Act] not only declares an affidavit of merit to be an element of a professional malpractice cause of action but also requires it to be filed and served within a specific and strict period of time, [and thereby] impinges upon this Court's constitutional power to regulate practice and procedure.

Ferreira, at 163-64. Not only is the *Cornblatt* requirement of dismissal with prejudice except in extraordinary circumstances "contrary" to the dismissal provisions of the Rules of Court, Justice Zazzali states:

> dismissing a claim for failure to comply with a procedural hurdle dis-serves both the legislative goal of preserving meritorious malpractice actions and the broader *raison d' être* of our court rules — achieving substantial justice on the merits.

Id. 167.

Justice Zazzali's opinion emphasizes the palpable tension between New Jersey's general notice pleading requirements and the Affidavit of Merit Act which operates "to impose a technical pleading requirement. As a result, courts adhering to the Affidavit of Merit statute, in turn, may violate the provisions of *Rule* 4:5-7." *Id.* Justice Zazzali maintains the "separation of powers" problem forming the basis of the Ohio Supreme Court's invalidation of that state's "affidavit of merit statute," *Hiatt v. Southern Health Facilities, Inc.*, 626 N.E.2d 71, 72 (Ohio 1994), mandates a corrective "judicial surgery" upon the New Jersey Act, so as to cure the defects while preserving legislative intent. Id. at 167, citing *Hamilton Amusement Ctr. v. Verniero*, 156 N.J. 254, 280 (1998), *cert. denied*, 527 U.S. 1021(1999).

It is settled that a legal cause of action is property within the meaning of the due process clause. *See Cities Servs. Co. v. McGrath*, 342 U.S. 330, 335-36 (1952); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 245 (1796); *NAACP v. Button*, 371 U.S. 415, 429 (1963), which is protected under the First Amendment *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 524 (2002); *Laker Airways Ltd. v. Pan Am. World Airways, Inc.*, 604 F. Supp. 280, 288 n.32 (D.D.C. 1984).

Because of the importance of a citizenry's practical access to the courts to seek redress of grievances, the *right* of access to the courts is recognized as one of the "fundamental rights" under the Constitution, *see, e.g. Ryland v. Shapiro*, 708 F.2d 967, 971-72 (5th 1983), implicating the Fourteenth Amendment. *Tennessee v. Lane*, 124 S.Ct. 1978, 1988 (2004). The Due Process clause requires states to afford civil litigants a "meaningful opportunity to be heard" by removing obstacles to their full

participation in judicial proceedings. *Id.* at 1988 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)).

When reviewing alleged procedural due process violations, the U.S. Supreme Court has distinguished between (1) claims based on established state procedures and (2) claims based on random, unauthorized acts by state employees. *See Hudson v. Palmer*, 468 U.S. 517, 532 (1984); *Parratt v. Taylor*, 451 U.S. 527, 541 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986). The latter case held that the Due Process Clause of the Fourteenth Amendment is not violated when a state employee intentionally deprives an individual of property or liberty, so long as the State provides a meaningful post-deprivation remedy. *Hudson v. Palmer*, 468 U.S. at 531, 533. When the deprivation occurs in the more structured environment of established state procedures, rather than random acts, the availability of post-deprivation procedures will not, *ipso facto*, satisfy due process. *Id.* at 532; *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435-36 (1982).

The Court's different treatment of the two situations rests on pragmatic considerations. *See Hudson v. Palmer*, 468 U.S. at 532-33. When a deprivation occurs because of a random, arbitrary act by a state employee "[i]t is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place. The loss of property, although attributable to the State as action under `color of law,' is . . . almost . . . [invariably] beyond the control of the State. Indeed, in most cases it is not only impracticable, but impossible, to provide a meaningful hearing before the deprivation." *Id.* at 532 (citations omitted). Furthermore, "*[that] an individual employee himself is able to foresee a deprivation is simply of no consequence. The*

controlling inquiry is solely whether the state is in a position to provide for predeprivation process." *Id.* at 534 (emphasis added).

The affidavit of merit statute purports to extinguish only one species of "tort" claims, without specific notice and opportunity to be heard, namely professional malpractice cases, among the "genus" of tort cases. Other claims which require an expert's report to ultimately avoid dismissal do not face such automatic extinguishment within an arbitrary time-table and arbitrary procedure. In *N.J.S.A.* 39:6A-8(a) and related legislative history, a similar objective, in the context of automobile negligence cases – to sort out unmeritorious soft tissue cases – is sorted through the normal discovery and summary judgment procedures. *See Watts v. Camaligan*, 344 N.J. Super. 453, 465 (App. Div. 2001).

New Jersey's most recent consideration of the "physician certification" requirement of AICRA came in December 2004, in *Casinelli v. Manglapus*, 181 N.J. 354 (2004), which partially affirmed the Appellate Division's holding that a dismissal without prejudice was appropriate for non-compliance with non-compliance with AICRA; 357 N.J.Super. 398, 401 (App.Div. 2003). In the context of *Casinelli*, the New Jersey Supreme Court has reasoned that the two statutes' legislative purposes are different, apparently based upon the remedies they advanced for non-compliance. *Casinelli* raised the question whether the "physician certification" requirement contained in the Automobile Insurance Cost Reduction Act, more popularly known as "AICRA," required a dismissal of the complaint upon a party's non-compliance. The Court held:

We hold that the physician certification is

> neither a fundamental element of the AICRA cause of action nor analogous to a pleading and therefore, that neither dismissal with nor without prejudice is compelled. Rather, we view the late filing of the physician certification as akin to a discovery violation, with respect to which the court may resort to any of a full panoply of remedies, ranging from an order to compel production through dismissal, depending on the facts.

Id. at 356-57.

The kind of "violation" alleged in *Casinelli* was identical to the violation ascribed to petitioners-Kyes below: failure to produce a physician certification establishing that the statutory "verbal threshold" requirement contained in *N.J.S.A.* 39:6A-8(a), demonstrating the "meritoriousness" of the tort suit. Although AICRA, like the Affidavit of Merit Act, requires the certification to be filed within "120 days of" the answer, this was not done in *Casinelli*. The certification was filed after the defendant's motion to dismiss was filed. Yet, the trial court declined to dismiss the complaint, finding good cause to extend the time within which to file the physician certification. On appeal granted by leave, defendant asserted that the complaint required dismissal with prejudice for failure to comply with the statute; and that even if the complaint was dismissed without prejudice, the statute of limitations had expired, and thus, the refiling would be prohibited. Id. at 359-60.

The Appellate Division held that non-compliance with AICRA generally required dismissal without prejudice. 357

N.J.Super. 398, 401 (App.Div. 2003). This decision would have construed the text of AICRA as essentially the same was AMA, as the text appears. But stating that there would be undue "harsh consequences" from dismissal, especially where the underlying statute of limitations had already expired, the appellate court held that equitable doctrines of "substantial compliance" and "estoppel" could be invoked to prevent dismissal. *Id.* at 416-17.

The New Jersey Supreme Court has characterized AICRA as "a cost-containment initiative enacted as a refinement to the no-fault automobile insurance system that originally became law in this State in 1972[,]" *Casinelli*, at 361, (citing *Caviglia v. Royal Tours of Am.*, 178 N.J. 460, 466-71, 842 A.2d 125 (2004) (reviewing the legal history of the no-fault system), which has two purposes: *first*, "to supply evidence that a plaintiff has, in fact, sustained an injury that qualifies for recovery of non-economic damages under the new verbal threshold and, [*second*] to provide a legal foundation for a charge of perjury, should false swearing later be shown. *Id.* at 362, citing *Watts v. Camaligan*, 344 N.J.Super. 453 (App.Div. 2001). These overall purposes may be summarized as an effort to prevent the filing of non-meritorious soft-tissue injury cases. The Court cites to this idea, *see Casinelli*, at 361, citing Cynthia M. Craig & Daniel J. Pomeroy, *New Jersey Auto Insurance Law* § 15:4-1a at 255 (2004) (commenting on legislative intent to address through AICRA "the failure of prior law to stem the tide of lawsuits related to soft-tissue injuries"), but the Court has held that AICRA was not intended to have the same objective as the Affidavit of Merit Act, *see Casinelli*, at 364-65, and therefore unnecessary to treat the failure to supply a physician certification by dismissal.

Petitioners respectfully maintain that the two statutes' broader objectives are the same: reveal their merits early in the litigation. Petitioners respectfully maintain that one statute does not result in a Draconian result; the other clearly does. While the constitutionality of the physician certification requirement in AICRA is no longer even "debatable," the same cannot be said of the Affidavit of Merit Act. As Petitioners maintained below, the Affidavit of Merit Act is unconstitutional under *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1981). At all three levels – trial, intermediate appeal and highest stage — the New Jersey courts have totally disregarded *Logan*, without explicating their decisions.

Yet, in *Logan*, as here, the plaintiff complied with the basic statute of limitations but failed to meet the second so-called "jurisdictional" deadline due to events beyond the petitioner's control. The U.S. Supreme Court held that the established state procedure that destroys a litigant's entitlement (namely a litigant's interest in a lawsuit) could not be upheld in the absence of proper pre-termination safeguards. Id. 428-37. The second jurisdictional bar, functionally equivalent to the Affidavit of Merit Act, was invalidated.

Logan's reasoning is traceable to *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), where the U.S. Supreme Court considered the constitutional sufficiency of notice given to the beneficiaries of a common trust fund of a judicial settlement of accounts by the trustee of the fund. The Court held:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but

> there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

Id. at 313.

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections.

Id. at 314. The notice in *Mullane* was deficient "not because in fact it fail[ed] to reach everyone, but because under the circumstances it [was] not reasonably calculated to each those who could *easily* be informed by other means at hand." *Id.* at 319 (emphasis added).

Building upon *Mullane* and *Logan,* in *Tulsa Professional Collection Services v. Pope,* 485 U.S. 478 (1988), the U.S. Supreme Court invalidated an Oklahoma statute that extinguished a creditor's claim against an estate unless the claim was made within two months of commencement of the probate proceeding. The Court rejected the state's argument that the Oklahoma statute was enacted to streamline the probate procedures. *See id.* at 480. The Court reiterated the continuing vitality of *Logan* and referred to *Mullane,* and reminded of its holding "that a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." The Court reasoned that,

while the state has a legitimate interest in using general statutes of limitations to prevent stale claims, a state has no right to add a second, systemic means of depriving a claim that has already crossed the line of the statute of limitations. *See id.* at 485-89.

Subsequently, the Court observed that "in the bankruptcy context there is a need for prompt administration of claims, *United Savings Assn. of Texas v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 375-376 (1988), but actual notice is required in bankruptcy proceedings. *Bank of Marin v. England*, 385 U.S. 99 (1966); *City of New York v. New York, N.H. & H.R. Co.*, 344 U.S. 293 (1953). *See also Mullane v. Central Hanover Bank & Trust Co., supra,* at 318-319 (trust proceedings). Probate proceedings are not so different in kind that a different result is required here. *See Tulsa* at 491.

There the Court found that

> Oklahoma's nonclaim statute is not a self-executing statute of limitations. Rather, the statute operates in connection with Oklahoma's probate proceedings to "adversely affect" appellant's property interest. Thus, if appellant's identity as a creditor was known or "reasonably ascertainable," then the Due Process Clause requires that appellant be given "[n]otice by mail or other means as certain to ensure actual notice." *Mennonite, supra,* at 800. *Id.; see also Mullane,* 339 U.S. at 314.

Tulsa at 491.

The only way to uphold the integrity of the affidavit of merit statute, under a constitutional analysis, is to provide for pre-termination court process to specifically give notice of possible termination of the entitlement, and a fair opportunity to be heard before actually doing so, rather than simply relying on the "constructive notice" given by the statute and mechanically ruling that a party's failure to serve within the statutory time will result in the termination of its claim.

In *Holman v. Hilton*, 542 F. Supp. 913 (D.N.J. 1982), the United States District Court for the District of New Jersey invalidated a New Jersey statute preventing prisoners from filing a lawsuit before they were released from prison, *N.J.S.A.* 59:5-3. The court reviewed *Parratt* and *Logan* and discussed the confusing discussion of "due process" considerations in *Parratt*. Although the statute did not extinguish a claim, but merely deferred it until after a prisoner was released, the court held that action was arbitrary and unconstitutional:

> *The deprivation effected by N.J.S.A. 59:5-3 is not, like the deprivation effected by the 120-day limitation provision in Logan, final in all cases.* A prison inmate who has a relatively short sentence may regain his right of action in a reasonable amount of time and successfully litigate a damages action. In plaintiff's case, however, as in the case of many other prison inmates suffering long-term or life sentences, the bar to suit imposed by N.J.S.A. 59:5-3 is, for all intents and purposes, a final one. Even if such a prison inmate does obtain release from confinement prior to death, he probably will not be able, as a practical matter, to marshall the

> witnesses and evidence necessary to prove his case and will thereby lose his cause of action *de facto*. For many of the same reasons, it is clear that the procedural hurdle created by N.J.S.A. 59:5-3, like the 120-day limitation provision in *Logan*, creates "an unjustifiably high risk that meritorious claims will be terminated." *Id.* at ___, 102 S.Ct. at 1157; *see* also *Mathews v. Eldridge, supra*, 424 U.S. at 335, 96 S.Ct. at 903. . . . [Emphasis added.]

Id. at 925-26.

> . . . The states may or may not be required under the federal Constitution to provide tort remedies against state officials. Once they create such rights of action, however, they must provide for a "hearing appropriate to the nature of the case . . . at a meaningful time and in a meaningful manner." *Logan, supra*, at ___, 102 S.Ct. at 1159. Here, as in the *Logan* case, the state has created an "established procedure" which "destroys [plaintiff's] entitlement without according him proper procedural safeguards." *Id.* at ___, 102 S.Ct. at 1158.

Id. at 926.

While the statute in *Holman v. Hilton* merely delayed the filing of a tort suit, the Affidavit of Merit Act purports to *extinguish* a lawsuit that has already complied with a general statute of limitations -- in this case merely because the claimant was misadvised by a church colleague. If Holman's delay

violated the due process clause, then, *a fortiori*, the forfeiture under the Affidavit of Merit Act violates the constitution even more palpably.

B. The Affidavit of Merit Act Denies Equal Protection

In *Logan*, the majority opinion did not reach an equal protection analysis as being unnecessary but Justice Blackmun (joined by Justices Brennan, Marshall, and O'Connor) issued a concurring opinion stating that the challenged state action also violated the "equal protection" clause of the 14th amendment. Without regurgitating Justice Blackmun's legal analysis, Petitioners respectfully maintain that, like the Illinois statute reviewed in *Logan*, the Affidavit of Merit "runs afoul of the lowest level of permissible equal protection scrutiny." *Logan*, at 441-42, citing *Schweiker v. Wilson*, 450 U.S. 221, 230-234 (1981) (even "rational-basis standard is `not a toothless one,'" quoting *Mathews v. Lucas*, 427 U.S. 495, 510 (1976)).

By the same principles, the Affidavit of Merit Act impinges equal protection because the Act separates one species of tort cases, malpractice cases, and treats it wholly differently from cases falling under the rubric of AICRA, with virtually identical statutory text, and with all other tort cases where experts' reports are routinely required to establish liability at trial, and operates to automatically extinguish the suit without regard to any consideration of the underlying merits.

New Jersey has failed to identify why compliance with the Affidavit of Merit Act cannot be satisfied *during* the courts of case management, as is the case with the physician certification requirement for auto-negligence cases under AICRA. This lack

of rational basis behind the two legislative schemes, ostensibly with functionally-identical legislative objectives, reveals an unreasonably different treatment being applied to one form of tort suits but not to another, despite similar legislative texts.

C. The Affidavit of Merit Act Violates Separation of Powers

Even in New Jersey, dismissal of a cause of action is viewed as the "ultimate sanction" in a case. *Abtrax Pharmaceuticals, Inc. v. Elkins-Sinn, Inc.*, 139 N.J. 499 (1995). Thus, even dismissals for repeated violations of court orders are viewed with great disfavor and as a sanction of "last resort" when found to be necessary by a court. *See id.* While the New Jersey courts have developed a comprehensive mechanism for sorting through abusive or frivolous cases, *see, e.g. Rule* 4:23-2 (failure to comply with order for discovery), *Rule* 4:23-3 (failure to admit), *Rule* 4:23-4 (failure to attend deposition), *Rule* 4:23-5 (failure to make discovery) – all of which are applied on minimal, actual notice to the litigants, the Affidavit of Merit Act "wipes out" a claim automatically.

Thus, by its terms, the affidavit of merit statute prevents the judiciary from exercising its own powers to dismiss, or not dismiss, an action that has passed the test under the applicable statute of limitations, and has already arrived "inside" the proverbial "courthouse doors." For the reasons stated by Justice Zazzali, the Act violates separation of powers. *See also Liapakis v. State*, 363 N.J. Super. 96, 104 (App. Div. 2003) (discussing NJ constitution, Art. VI, Sec. II, para. 3).

As is clear from a review of the state-court decisions appended in the Appendix, New Jersey has failed to apply

federal constitutional principles despite the fact that those principles were specifically invoked by petitioners at each and every level of the state court litigation. Because New Jersey has failed to protect petitioners' minimal rights under the federal constitution, and equally under state constitution, their decisions should be invalidated as a matter of law.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari and reverse the judgment of the New Jersey Supreme Court, the judgment of the New Jersey Superior Court, Appellate Division, and the judgment of the New Jersey Superior Court, Law Division.

Dated: July 29, 2005

Respectfully submitted,

Michael S. Kimm

Certificate of Service

Michael S. Kimm, Esq., certifies that the foregoing petition was served and filed as follows:

3 copies to counsel of record by regular mail:

Evelyn Farkas, Esq.
Farkas & Donohue, LLC
389 Passaic Avenue
Fairfield, New Jersey 07004

40 copies and original to the clerk's office with filing fee by regular mail.

Dated: July 29, 2005

_____

Michael S. Kimm

Appendix A

SUPREME COURT OF NEW JERSEY
C-1007 September Term 2004
57, 591

BONG SUN KYE, NARI KYE, and
KYUNG KYE,

Plaintiffs-Appellants,

v.

CHANG W. LEE,

Defendant-Respondent,

FILED
May 13, 2005
Clerk's Stamp

and

VALLEY HOSPITAL,

Defendant.

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-1825-03 having been submitted to this Court, and the Court having considered same,

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 11 th day of May 2005.

The foregoing is a true copy
of the original on file in my office

/s/ Stephen Townsend
Clerk of the Supreme Court
Of New Jersey

/s/_____
CLERK OF THE SUPREME COURT

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1825-03T5

BONG SUN KYE, NARI KYE, and
KYUNG KYE,
Plaintiffs-Appellants,

v.

CHANG W. LEE,
Defendant-Respondent,

and
VALLEY HOSPITAL,
Defendant.

Argued January 31, 2005 - Decided FEB 22 2005

Before Judges Petrella and Lintner.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, L-463-03.

Michael S. Kimm argued the cause for appellants.

Beth A. Hardy argued the cause for respondent (Farkas & Donohue, attorneys; Ms. Hardy, on the brief).

PER CURIAM

On January 16, 2003, a medical malpractice complaint was filed on behalf of Bong Sun Kye (Mrs. Kye), widow, and her daughters Nan and Kyung, without their knowledge, against defendants Dr. Chang W. Lee and Valley Hospital, asserting that Mrs. Kye's husband, Ki Ho Kye, died from cardiac arrest resulting from defendants' negligent care and treatment on January 27, 2001.[1] Dr. Lee filed his answer on March 19, 2003. On July 30, 2003, Dr. Lee moved to dismiss plaintiffs' complaint because plaintiffs had failed to file an Affidavit of Merit within 120 days of defendant's answer as required by N.J.S.A. 2A:53A-27. While the motion was pending its scheduled return date, plaintiffs served and filed an Affidavit of Merit signed by Dr. Benjamin Zola, a medical doctor specializing in the field of emergency cardiac intervention and treatment. Plaintiffs' counsel argued that the motion should be denied because the affidavit was served within days of the motion's return date. On September 12~ 2003, the judge issued a letter opinion reciting the following substantially undisputed facts:

According to Mrs. Kye's certification, Mrs. Kye initially consulted attorney Michael Kimm ("Kimm") in March 2001. At that time, Kimm offered to obtain medical records to review the case.. Mrs. Kye claims that due

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[1] The record indicates that the complaint against Valley Hospital was dismissed without prejudice, for lack of prosecution, on August 9, 2003.

to multiple relocations, she was not able to meet with Kimm until January 10, 2003. At that time, Mrs. Kye decided not to retain Kimm due to an inability to pay for litigation costs and expert fees.

It is undisputed that Mrs. Kye did not serve an affidavit of merit within the 120— day window.[2] A Complaint, nevertheless, was filed by Kimm, on Mrs. Kye's behalf on January 16, 2003. Dr. Lee filed an answer on March 19, 2003. Obviously, Kimm was acting as counsel for Mrs. Kye on this matter and she presumably knew this. After initially consulting with Mrs. Kye in March 2001, Kimm proceeded to obtain medical records over the next 22 months. As noted, Kimm filed the January 16, 2003 Complaint and retained an expert. Only a lack of diligence or carelessness can be blamed for this failure to file an affidavit of merit.

Kimm says he made several telephone calls to Mrs. Kye and she did not respond. Not knowing that Kimm filed a Complaint in January 2003 Mrs. Kye believed the statute of limitations had run.[3] ultimately, Mrs. Kye met with Kimm on August 7, 2003.

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[2] Plaintiffs never requested an extension during the 120-day window to file an affidavit of merit . . . . Not until August 7, 2003, after Dr. Lee filed this motion to dismiss with prejudice for failure to produce the affidavit, did plaintiffs' counsel finally do so.

[3] In March 2.003, Mrs. Kye was misinformed by a lawyer/acquaintance from church that the statute of limitations had run.

At oral argument on the motion, plaintiffs' counsel argued that "equitable factors" warranted accepting the late filing, because the claim was meritorious and defendants were not prejudiced. Finding that plaintiffs' counsel's failure to file a timely Affidavit of Merit arose from lack of diligence and not extraordinary circumstances, the judge dismissed plaintiffs' complaint with prejudice.

Plaintiffs filed a motion for reconsideration, arguing that the Affidavit of Merit statute as applied here was unconstitutional because plaintiff had complied with the basic statute of limitations but failed to meet the second jurisdictional deadline due to events beyond her control. The judge denied plaintiffs' motion and this appeal followed.

On appeal, plaintiffs argue that the Affidavit of Merit statute violates due process and equal protection because it prevents access to the court by creating a jurisdictional deadline beyond a claimant's control and is violative of the doctrine of separation of powers because it impinges on the court's function to retain or dismiss lawsuits.

Plaintiffs' arguments are legally and factually unsupported and do not warrant discussion in a written opinion. R. 2:11-3(e)(l)(E). These same constitutional arguments were addressed in dicta by our Supreme Court in Cornblatt v. Barow, 153 N.J. 218, 247 (1998); see also Balthazar v. Atlantic City Medical Center, 358 N.J. Super. 13, 20 fn.6 (App. Div.) certif. denied, 177 N.J. 221 (2003) (finding that the plaintiff's constitutional challenge did not have sufficient merit to warrant further discussion in a written opinion).

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

Jim Flynn
CLERK OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

CHARLES J. WALSH
JUDGE

BERGEN COUNTY JUSTICE CENTER
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September 12, 2003

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Re: Kye v. Lee, et al.
Docket No.: BER-L-463-03

Dear Counsel:

This matter is before the Court on a motion by defendant Chang W. Lee, M.D. ("Dr. Lee") seeking to dismiss plaintiffs' Complaint with prejudice for failure to comply with the affidavit of merit statute ("AMS"). Plaintiffs Bong Sun Kye ("Mrs. Kye"), Nan Kye and Kyung Kye oppose the motion. For the reasons set forth in this Letter Opinion, Dr. Lee's motion to dismiss with prejudice is granted.

This is a survivorship (N.J.S.A. 2A:14-1 et seq.) and wrongful death action (N.J.S.A. 2A:3 1-1 et seq.) brought on behalf of plaintiffs' decedent, Ki Ho Kye ("K. Kye"). The facts provided in the record are sparse. However, according to the Complaint, K. Kye had a history of heart disease. He was under

the exclusive medical care and supervision of Dr. Lee and Valley Hospital.[1] Plaintiffs now allege that the care and treatment K. Kye received was negligently rendered and ultimately led to K. Kye's death on January 21, 2001.

According to Mrs. Kye's Certification, Mrs. Kye initially consulted attorney Michael Kimm ("Kimm") in March 2001. At that time, Kimm offered to obtain medical records to review the case. Mrs. Kye claims that due to multiple relocations, she was not able to meet with Kimm until January 10, 2003. At that time, Mrs. Kye decided not to retain Kimm due to an inability to pay for litigation costs and expert fees.

It is undisputed that Mrs. Kye did not serve an affidavit of merit within the 120-day window. [2] A Complaint, nevertheless, was filed by Kimm, on Mrs. Kye's behalf on January 16, 2003. Dr. Lee filed an answer on March 19, 2003. Obviously, Kimm was acting as counsel for Mrs. Kye on this matter and she presumably knew this. After initially consulting with Mrs. Kye in March 2001, Kimm proceeded to obtain medical records over the next 22 months. As noted, Kimm filed the January 16, 2003 Complaint and retained an expert. Only a

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[1] The matter with respect to Defendant Valley Hospital was dismissed without prejudice for lack of prosecution on August 9, 2003.

[2] Plaintiffs never requested an extension during the 120-day window to file an affidavit of merit as allowed under *Burns v. Belafsky*, 166 N.J. 466 (2001). Not until August 7, 2003, after Dr. Lee filed this motion to dismiss with prejudice for failure to produce the affidavit, did plaintiffs' counsel finally do so.

lack of diligence or carelessness can be blamed for this failure to file an affidavit of merit.

Kimm says he made several telephone calls to Mrs. Kye and she did not respond. Not knowing that Kimm filed a Complaint in January 2003, Mrs. Kye believed the statute of limitations had run.[3] Ultimately, Mrs. Kye met with Kimm on August 7, 2003.

Dr. Lee maintains that Mrs. Kye failed to comply with the requirements of the AMS, *N.J.S.A.* 2A:53A-26, *et seq.* Specifically, defendant asserts that plaintiffs failed to comply with *N.J.S.A.* 2*A*:53*A*-27, which provides in relevant part:

> In any action for damages for personal injuries... resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation, *the plaintiff shall, within 60 days following the date of filing of the answer to the complaint by the defendant,* provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational

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[3] In March 2003, Mrs. Kye was misinformed by a lawyer/acquaintance from church that the statute of limitations had run.

> standards or treatment practices. *The court may grant no more than one additional period, not to exceed 60 days, to file an affidavit pursuant to this section, upon a finding of good cause.* (Emphasis added).

The AMS was "designed as a tort reform measure and requires a plaintiff in a malpractice case to make a threshold showing that the claims asserted are meritorious. It is designed to weed out frivolous lawsuits at an early stage and to allow meritorious cases to go forward." *Galik v. Clara Maass Med. Center*, 167 N.J. 341, *350* (2001) (citing *Cornblatt, 153* N.J. at 242). Here, Mrs. Kye was required to provide an affidavit to the defendant executed by an appropriately licensed physician. *See N.J.S.A.* 2A:53A-27.

"A plaintiff must file an affidavit of merit within sixty (60) days of defendant's answer, but may file after sixty (60) days and up to 120 days of the answer for good cause shown." *Palanque v. Lambert-Woolley, MD.*, 168 N.J. 398, 404 (2001) (citations omitted). Failure to file an affidavit of merit within 120 days results in dismissal of plaintiff's complaint with prejudice unless extraordinary circumstances occurred to prevent the filing. *See id.* (citing *Cornblatt, 153* N.J. at 247); *Balthazar v. Atlantic City Medical Centre*, 358 N.J. Super. 13 (App. Div. 2003) *certif, denied* 177 N.J. 221 (2003) (Dismissal of complaint with prejudice because service of an affidavit of merit after 120 days fails to meet the elements required of *N.J.S.A.* 2A:53A-27).

"Courts are required to enter into a fact-sensitive inquiry in order to determine whether 'extraordinary circumstances' exist so as to relax the so-many-day filing day requirement of a

rule or statute." *See Hyman, Zamfi & Manard v. Cornell*, 309 N.J. Super. 586, 593 (App. Div. 1998) (citing *Hartsfield v. Fantini*, 149 N.J. 611, 618-19 (1997)). "Carelessness, lack of circumspection, or lack of diligence on the part of counsel are not extraordinary circumstances which will excuse missing a filing deadline." *Hyman*, 309 N.J. Super. at 593.

Kye filed a Complaint on January 16, 2003, in New Jersey Superior Court. An answer was filed on behalf of defendant Dr. Lee on March 19, 2003. On August 7, 2003, Mrs. Kye filed an affidavit of merit prepared by Dr. Benjamin Zola. The sixty (60) days anticipated by the AMS runs from the date the defendant filed an answer. *See Kritzberg v. Tarsny*, 338 N.J. Super. 254, 257 (App. Div. 2001). The sixty (60) day period expired on May 19, 2003. The 120-day period, which would reflect a grant of the additional sixty (60) day period, expired on July 19, 2003.

Since Mrs. Kye has failed to comply with the AMS, she must provide extraordinary circumstances to prevent the Complaint from being dismissed with prejudice. *See Cornblatt v. Barow, 153* N.J. 218 (1998). Plaintiffs' counsel says that Mrs. Kye is a Korean national who speaks no English. According to Kimm these facts alone constitute such extraordinary circumstances. The Court disagrees. This is not the type of extraordinary circumstance anticipated by the AMS. *See Tischler v. Watts*, 177 N.J. 243, 247 (2003) (extraordinary circumstances justified when but for the attorney's need for immediate and aggressive radiation and chemotherapy treatments, she would have discovered and rectified deficiencies in the affidavit of merit within the 120 days permitted by the AMS); *Davies v. Imbesi*, 328 N.J. Super. 372, 377 (App. Div. 2000) (difficulty to obtain xrays are not exceptional circumstances); *Hyman*, 309 N.J. Super. at 593

(carelessness, lack of circumspection, or lack of diligence on the part of counsel are not extraordinary circumstances which will excuse missing a filing deadline).

For these reasons, Dr. Lee's motion to dismiss plaintiffs' Complaint with prejudice for failure to file an affidavit of merit is granted. An Order is enclosed with this Letter Opinion.

Very truly yours,

Charles J. Walsh, J.S.C.

CJW/jdk

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY

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Attorneys for defedant, Dr. Chang W. Lee
Our File No. G-142

Bong Sun Kye, Nari Kye, and Kying Kye — BER-L-463-03

Plaintiffs,

Civil Action

-Vs.-

Dr. Chang W. Lee; Valley Hospital and JOHN DOE (fictitious names intending to designate the business entity or person responsible for assisting) and each of them jointly, severally or in the alternative,

Order

Defendants.

THIS MATER HAVING been opened to the Court by *Farkas & Donohue, LLC*, attorneys for Chang Lee, M.D. for a dismissal of plaintiffs' complaint and all crossclaims with prejudice against Chang Lee, M.D. and the court having considered the arguments of counsel and the moving papers submitted by the parties and for good cause having been shown;

IT IS, on this 12th day of September, 2003;

ORDERED that plaintiffs' Complaint and all crossclaims be dismissed with prejudice against defendant, Chang Lee, M.D.; and it is further;

ORDERED that a copy of this Order shall be served upon all counsel within seven (7) days from the date herein.

/s/_____
Charles J. Walsh, J.S.C.

Opposition: __X__YES ____NO

* for the reasons set forth in the letter opinion dated September 12, 2003